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**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 5 of 2020

BETWEEN : 'IKANI L. TALIAI

- Plaintiff

**AND : 1. MINISTRY OF INTERNAL AFFAIRS
2. DR. SAIA MA'U PIUKALA
3. FOTU KUOHIKO VALELI FISI'IAHI**

- Defendants

BEFORE HON. JUSTICE NIU

**Counsel : Mrs. P. Tupou, KC, for plaintiff
: Ms. R. Kautoke & Ms. 'E. 'Akau'ola for first and
third defendants.**

Trial : 24 and 25 June 2021.

**Submissions : filed by Kautoke and 'Akau'ola on 22 July 2021.
: filed by Taione on 16 August 2021.
: filed by Tupou on 3 September 2021.**

Hearing : 6 September 2021.

Ruling : 27 September 2021.

RULING

The claim

- [1] The plaintiff claims that he was validly retained by the first defendant, Ministry of Internal Affairs, as project manager for the Sports Reform and Commercialisation Project of the second defendant, in extension of his previous 2 year appointment, for another year, but at a reduced base fee of \$140,000 for that one year, commencing on 1 September 2019, the base fee to be paid monthly in advance in the sum of \$11,666.67 within 3 business days of receipt of an invoice for the same.
- [2] He says that a valid contract of that retention was signed by him and by the first defendant Ministry on 30 August 2019, the second defendant signing it as Minister of the first defendant and the third defendant, who was the CEO of the first defendant, signing it as witness.
- [3] He says that he provided consultancy service in accordance with the contract and that he rendered his invoice for the month of September 2019 and for the month of October 2019 on 2 October 2019 for a total sum of \$23,333.34, but that the first defendant failed to pay any part of that invoice.
- [4] He says that on 5 November 2019 he sent his invoice for \$11,666.67 for the month of November but no payment was received for it either. He says he sent his invoice for December on 10 December 2019 but again no payment was received, and that he sent his invoice for January 2020 on 10 January 2020 but with the same result.
- [5] On 18 February 2020, he filed his claim in this Court against the first defendant only.

[6] Upon the trial of his claim on 6 and 7 July 2020, the plaintiff sought leave to join the second and third defendants as defendants and it was granted (upon costs thrown away being payable by him in any event).

[7] He claims against the second and third defendants because he says that they are personally liable for the obligations arising under the contract, as is provided in Regulation 59 (5) of the Public Procurement Regulations which provides:

“(5) Contracts shall be signed by the Head of the contracting entity or a person delegated by him and shall come into effect only when any endorsement or approval, as the case may be, required by those Regulations has been obtained in writing. Failure to obtain such endorsement or approval renders the person signing the contract personally liable for all obligations arising there under.”

[8] He therefore claims damages for breach of contract against the defendants jointly and severally in the sum of \$140,000 and general damages in the sum of \$80,000.

Defences

[9] **The first defendant** (Ministry of Internal Affairs) says that the contract of the plaintiff was unenforceable because such contract was either –

(a) a consultancy agreement in which case it was required by the Public Procurement Regulations (made under S.44 of the Public Finance Management Act 2002) to be approved after it had gone through the Public Procurement Process which was provided in those Regulations, but that there was no such approval because it had not gone through the Public Procurement Process, or

(b) a public employment contract in which case it was required by the Public Service Act to be approved by the Public Service

Commission, but which was not so approved because it was never submitted to the Public Service for such approval.

[10] It also says that the plaintiff did not perform any service for which he was contracted and accordingly was not entitled to any payment.

[11] It further says that the contract expressly provided that it was to be subject to the laws of Tonga, and that, irrespective of what it provided, the contract was subject to the Public Service Act approval of the Public Service Commission or the approval under the Public Procurement Process under the Public Procurement Regulations.

[12] **It counter-claims** against the plaintiff that because the plaintiff has failed to render the service required of him under the contract, it asks for orders declaring that the first defendant is not liable to pay anything to the plaintiff and that the first defendant be allowed to terminate the contract for failure of the plaintiff to perform as required by it.

[13] **The second defendant** (Minister) says that he was no longer a Minister after the Government was changed. He says that the provisions of Regulation 59 (5) relied upon by the plaintiff does not apply to the contract which he signed because Regulation 59 (5) only applied to contracts concluded after competitive bids had been made for it.

[14] **The third defendant** (CEO) says that he adopts the defences and counter claim of the first defendant and he was represented in these proceedings by the same Crown counsel for the first defendant.

The facts

[15] I have found these as the relevant facts in this matter.

[16] The plaintiff is a Tongan man aged 54 who had lived in Australia and had worked there as a consultant for sports for 10 years. In 2017, the Minister for Internal Affairs, at the time, Mr. Fe'ao Vakata, instructed an officer of the Ministry, Netina Latu, to contact the plaintiff to come and

work as consultant Director of National Sport of Tonga. Terms and conditions were agreed and a 2 year contract was signed to run from 1 July 2017 to 30 June 2019, although it was signed on 4 August 2017. A copy of that contract was attached to the brief of evidence of the third defendant, Mr. Fisi'iahi. I refer to it as "the first contract".

- [17] Under that contract the plaintiff was paid a total of Australian dollars 74,000 for each of the 2 years, 60,000 of which was for his salary which was payable monthly, and \$14,000 which was payable for his monthly electricity and water bills, internet installation and monthly internet and communication, and for return air fare to Melbourne, Australia, once a year.
- [18] In December 2018, the plaintiff was appointed chairman of Tonga Sports Council, a body established under the Tonga Sports Council Act 1989, which had an additional monthly salary of \$1,100 and a meeting fee of \$100.
- [19] The first contract expired on 30 June 2019 at the time that the plaintiff went to Samoa with Tonga's sports team for the South Pacific Games which was held there from June to July 2019. He was of course still Chairman of the Sports Council.
- [20] Tonga did well in the Games, winning 29 medals (including 9 gold) compared to the Games held in Papua New Guinea in 2015 where Tonga only won 17 medals (including 7 gold).
- [21] When the plaintiff went to brief the Prime Minister, Mr. 'Akilisi Pohiva, on returning to Tonga after the games, so that he, the plaintiff could return to Australia, the Prime Minister asked him to extend his contract for another year to further assist the Sports Council in its development, and instructed the then Minister of Internal Affairs, Mr. Saia Piukala, the second defendant, to work out the terms of the contract with the plaintiff for that one year.

- [22] The Minister (second defendant) instructed the Chief Executive Officer of the Ministry to work out the terms of the contract with plaintiff. The Chief Executive Officer (the third defendant) worked out the terms of contract with the plaintiff and they agreed to its terms, and it was signed by the Minister (second defendant) and was witnessed by the Chief Executive Officer (third defendant) and it was also signed by the plaintiff on 30 August 2019, to come into effect from 1 September 2019 to 30 August 2020. I refer to that contract as "the second contract".
- [23] In that contract, the plaintiff was to be paid a total salary of Tongan pa'anga, 140,000 in equal monthly payments of T\$11,666.67, and a commission of 7.5% of the net total of successfully negotiated agreements pertaining to sponsorship media broadcasting, promotion and investment monies which the plaintiff would have undertaken with third parties to the value of two million pa'anga and above.
- [24] The contract included a term (clause 3C2) that the salary (called the base fee) "will be paid a month in advance via electronic transfer directly to the consultant's nominated bank account within 3 business days of receipt of an invoice or claim". Except for the inclusion of the "electronic transfer to nominated bank account" in the second contract, the provision was the same as it was in the first contract.
- [25] The Prime Minister, 'Akilisi Pohiva, died on 12 September 2019. The new Prime Minister, Pohiva Tu'i'onetoa, was appointed on 27 September 2019 and the new Cabinet Ministers were appointed on 14 October 2019.
- [26] On 2 October 2019, the plaintiff forwarded to the third defendant his invoice for his salary for the month of September and for the month of October in the total sum of \$23,333.34. The third defendant CEO advised the second defendant Minister that Cabinet had to approve the plaintiff's contract, as had been the case with the first contract, so that payment could be made to the plaintiff. On 4 October 2019, with the second

defendant Minister in Cabinet, Cabinet approved the contract of the plaintiff.

[27] It is not clear what the third defendant Chief Executive Officer did with the second contract and the Cabinet decision (no. 1115 of 4 October 2019) approving it after obtaining that approval because the Treasury officer responsible for processing procurement of goods and services, Pisila `Otunuku, said that she never received and never saw the contract (or the Cabinet decision concerning it) and the Chief Executive Officer of the Public Service Commission, Lia Maka, who was responsible for processing of employment of civil servants and even servants on contracts, never saw it or the Cabinet approval either.

[28] The 4 invoices of the plaintiff for September 2019 to January 2020 (5 months) have remained unpaid up to now.

The issues

[29] Mrs. Tupou, counsel for the plaintiff, and Ms. Kautoke, counsel for the first and third defendants, are more or less agreed on the issues to be decided in this matter and I will deal with each of them.

Was the contract an employee contract or a consultancy contract?

[30] The first issue is whether the plaintiff's (second) contract is or was an employee contract or whether it was a consultancy contract. If it is an employee contract, it should have been approved by the Public Service Commission. If it is a consultancy contract it should have been approved in accordance with the Public Procurement Regulations.

[31] Ms. Kautoke points out S.6 (f) of the Public Service Act 2002, as amended, which provides that –

“The functions of the Commission are to –

...

- (f) appoint, promote, confirm, discipline and dismiss employees and resolve employment disputes;

... ”

And S.23 A of the same Act which provides –

- “(1) The Commission may, by notice in the Gazette, issue Employment Instructions, not inconsistent with this Act, relating to –
 - (a) the functions and powers of the Commission under this Act; or
 - (b) the good management of the Public Service.
- (2) Without limiting the generality of subsection (1), the Employment Instructions may provide the implementation instructions of policies.”

[32] She then points to the Public Service Policy Manual which has been issued by the Commission in pursuance of its power under S.23A, the provisions of which provide as follows:

“5. **Application**

- (1) This Policy applies to all employees who are employed in the public service.
- (2) Persons who are appointed to fill designated posts on a contractual basis are subject to the terms of this Policy, provided that the contract shall prevail if there is any provision inconsistent with this policy.
- (3) Notwithstanding sub-policy (2) contracts shall be subject to the Public Service Act.”

“8. **Permanent employees**

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- (3) Notwithstanding sub-policy (2) contracts shall be subject to the Public Service Act.”

“8. **Permanent employees**

- (1) Permanent employees shall be appointed to permanent posts funded from the annual estimates of the relevant Ministry.
- (2) Permanent posts may be established on a full time or part time or basis or on contract.

9. **Contract employees**

- (1) Contract employees shall be appointed for a fixed term on an individual contract.
- (2) All appointments on contract shall be approved by the Commission before any remuneration is paid out."

[33] She submits that the contract of the plaintiff with the first defendant was and is an individual contract whereby the plaintiff was a contract employee appointed for a fixed term and was accordingly required to be approved by the Commission before any remuneration was to be paid out to him. She says that the plaintiff was informed of that requirement and that that requirement was required to be complied with, but that the plaintiff refused to accept it and accordingly brought this present claim instead.

[34] In response to that, Mrs. Tupou, counsel for plaintiff, says that the contract of the plaintiff was and is a consultancy contract, and that it was intended by both parties to be a consultancy contract, and it was worded and was stated to be a consultancy contract and that it is accepted that it was subject to the Public Procurement Regulations, and not the Public Service Act.

[35] She refers to the provisions of the Public Procurement Regulations which specifically defines "consultancy services" and "consultant". She also refers to Reg. 23(8), and to Reg. 28(3) which provide for consultant services – as follows:

"23. Determining the object of procurement.

...

- (8) The description of consultancy services to be procured under Part 9 shall include, where appropriate –

(a list of things from (a) to (j) are then listed)”

28. Selection of procurement method

...

- (3) Consultant services shall be procured by the request for proposals method in accordance with the provisions contained in Part 9 of these Regulations.”

“Part 9 – PROCUREMENT OF CONSULTANCY SERVICES

...

62. Methods of selection and conditions of use.

...

- (2) The following methods shall only be used with the prior approval of the Head of a contracting entity –

...

- (c) Single source selection (SSS) – This method shall only be used in exceptional cases, such as –

- (i) For tasks as continuation of previous completed assignment, or

...

- (d) Selection of individual consultants (SIC) – This method shall be used when –

- (i) the qualification and experience of the individual are the paramount requirement;
- (ii) teams of personnel are not required; and
- (iii) no outside professional support is required.”

- [36] The first thing I wish to say is that whereas the Public Service Act makes no mention of consultancy or consultant the Public Procurement Regulations does. The Regulations make express and specific provisions about the procurement by Government (that is by any Ministry) of the services of a consultant as quoted in Regulations 23, 28 and 62 above.
- [37] Secondly, the Public Service Act only concerns "employees" in a Government Ministry or Agency except the persons listed in Schedule II, and "employee" is defined in the Act as "a person employed in the Public Service." The essential feature of employment is that the employer controls the work of the employee and the manner in which the employee works so that the employer is vicariously liable for default committed or omitted by the employee during the course and within the scope of his employment.
- [38] A consultant is not such an employee. He is only contracted to perform a specific service for which he is the expert and he carries it out in accordance with his expertise. That is what he is contracted to carry out. Unless he agrees to, he is not bound by the rules and instructions which Government provide to govern its employees because he is not an employee of Government. Government does not control how the consultant carries out his work, his hours of work, his sick days, his leave, or any employee thing because he is not an employee.
- [39] Thirdly, what the Public Services Act empowered the Commission to do under S.23A was to issue "Employment Instructions". It did not empower the Commission to make or change laws. It also required that the instructions made be "not inconsistent with this Act". The Act required it to deal only with the employees of Government. It would appear that the Commission has now made laws which may include the consultants as "employees" of Government. That would be inconsistent with the Act and is ultra vires per se.

[40] I therefore agree with Mrs. Tupou that the contract of the plaintiff was not required to be approved by the Public Service Commission under the Public Service Act, because the plaintiff was a consultant, not an employee.

Was the contract processed under the Public Procurement Regulations?

[41] Ms. Kautoke says it was clear from the evidence that this contract had not been approved in accordance with Public Procurement Process required under the Public Procurement Regulations, and that it is accordingly invalid and unenforceable.

[42] Mrs. Tupou says in response that this contract was duly approved in accordance with the provisions of Regulation 62 (2) (c) (i) of the Public Procurement Regulations (as quoted in paragraph 35 above).

[43] I understand Mrs. Tupou to mean that when the Chief Executive Officer, (the third defendant) as Head of the Ministry (first defendant) signed the second contract as witness, he thereby approved the contract, in accordance with the requirement of Regulation 62 (2) of the Public Procurement Regulations, which provides:

“(2) The following methods shall only be used with the prior approval of the Head of a contracting entity – ”

I accept that the term “Head of Department” was changed to the term “Chief Executive Officer” by the Public Service (Amendment) Act 2010.

[44] She says that the third defendant, as Head of the Ministry (the contracting entity) approved the contract of the plaintiff because he advised the Minister (the second defendant) that the contract was in order and that the Minister should sign it. The third defendant denied that in his evidence and said that he had in fact advised the Minister not to sign it. That was denied by the Minister in his evidence. He said that he signed the contract because the third defendant advised him to sign

it, because he had left the matter to be worked out by the third defendant to his satisfaction.

[45] Having heard both defendants give their evidence, I am quite satisfied that the Minister was giving his evidence truthfully and I believe him. I am satisfied that the CEO third defendant was satisfied that the contract which he had negotiated with the plaintiff was in order and was ready to be signed. He thereby approved it, and he advised the Minister to sign it, and he also signed it as witness, thereby confirming that he was aware of its conclusion.

[46] I therefore accept for the purpose of Regulation 62 (2) that the third defendant, as head of the contracting entity, the first defendant, did give his "prior approval" to engage the plaintiff by contract "for tasks as continuation of previous completed assignment," as is allowed under that sub-regulation (i) as a "single source selection (SSS)" and advised the Minister to sign the contract with the plaintiff, which he witnessed to ensure that it was duly done.

[47] I therefore find that the contract of the plaintiff (the second contract) was duly "approved" in accordance with the Public Procurement Regulations.

Did the plaintiff perform the services for which he was contracted (under the second contract)?

[48] Ms. Kautoke says in her submissions under her heading "Accepted Facts" that "the Plaintiff had not performed any obligation under the Contract." She referred to the evidence of the plaintiff himself in cross-examination by her where he admitted that he had not performed any of the activity under the (second) contract. She points out that the 4 invoices of the plaintiffs contained no particular of any service which he had rendered in pursuance of the contract.

[49] Mrs. Tupou does not dispute that, and I agree with Ms. Kautoke that the plaintiff did not perform any service for which he was engaged by the contract. Mrs. Tupou appears to argue that the plaintiff is however entitled to payment under the provision of the contract. That appears to be the provision of clause 3C2 of the contract which provides:

“2. The Base fee will be paid a month in advance via electronic transfer directly to the Consultant’s nominated bank account within 3 business days of receipt of an invoice or claim.”

[50] Annex B provides for payment of the base fee of \$140,000 per year at a monthly sum of TOP\$11,666.67.

[51] However, clause 3C1, preceding 3C2, provides:

“1. The client shall pay the Consultant for **services rendered** on the basis as specified in Annex B.”

(emphasis added)

That appears to mean that the services must be rendered first (for the month) before the client shall pay the consultant. That ties in with the requirement in 3C2 that an invoice (for the services rendered) be issued by the consultant for such payment.

[52] It therefore makes no sense to include the words “will be paid a month in advance” are inserted in 3C2 because it would mean that the base fee would then be paid for services which would not have been rendered as yet. That clearly conflicts with the clear words of 3C1 that the payment be for “services rendered”.

[53] It appears to me that the words “in advance” had been used in the first contract to provide for payment of additional benefits specified in Annex B of that contract such as internet installation (A\$200), communication, phone and internet credit (A\$200) and return ticket to Melbourne (A\$1,300) because such payments would need to be paid in advance of

the month in which they are to be used. I do not think that it was intended by the parties that the base fee for the services of the consultant was to be paid in advance for the month in which the services were to be rendered, because the parties expressly provided in their contract that the payment to be paid was for services which have been rendered in the month, hence their use of the words "for services rendered". And it is clear that the words "in advance" were adopted in the second contract inadvertently because no advance payments were needed in the second contract as they were in the first contract.

[54] I note that the third defendant CEO did not query the 4 invoices of the plaintiff at all, and I believe that he did not do so because he assumed that the words "in advance" were correctly adopted in the second contract as renewal or extension of the first contract.

[55] However, that does not justify the interpretation which the plaintiff has placed on those words in the second contract. If the interpretation of the plaintiff is to be allowed, the plaintiff will be entitled to be paid every month in advance without rendering any service at all and that would be absurd.

[56] But that is precisely what the plaintiff is now claiming. He has rendered no service under the contract and yet he claims payment of those unrendered services, at least of the 5 months for which he issued his invoices, and now claims the payment for the remaining 8 months as well in his present claim.

Conclusions

[57] I must therefore come to the conclusion that the claim of the plaintiff cannot be sustained. He has claimed specific performance of the contract, that is, that this Court orders the first defendant to pay him for the 4 months for which he had issued his invoices, and to order the first defendant to pay him for the remaining 8 months. Specific performance is an equitable remedy and equity requires that a person "who seeks

equity must do equity” and that a person “who comes into equity must come with clean hands”. A person who has not performed his part of bargain cannot ask that the other person be ordered to perform his part instead.

[58] The plaintiff has failed to prove that he had performed his obligations under the contract, or that he had been prevented by the defendants from performing his contractual obligations.

[59] As to his claim that the second and third defendants are personally liable for payment of the payments to him in accordance with the provisions of Regulation 59 (5) of the Public Procurement Regulations, I have to say that that regulation might have been applicable if the appropriate approval for the contract as required by the Regulations had not been obtained. But I have already found that the appropriate approval had been obtained under Regulation 62 (2) (c) (i). I therefore find that the claim of the plaintiff against the second and third defendants cannot be sustained either.

[60] As to the counter claim of the first defendant, in view of the plaintiff’s claim being unsustainable, and in view of the fact that the contract it had already expired on 30 August 2020, I do not think that it is necessary that the orders sought therein be made.

Orders

[61] For the foregoing reasons, I order that the claim of the plaintiff be dismissed with costs to the defendants to be taxed if not agreed.

NUKU’ALOFA: 27 September 2021.



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